rejected the English distinction and asserted an inherent power in their equity courts to decree the sale of infants' lands.[7] The need of such jurisdiction is obvious in the case of infants whose estates are burdened with unproductive realty; and its wisdom is everywhere recognized by remedial legislation. Despite the statutes, however, the question of inherent jurisdiction is not yet at rest, but emerges when strict compliance has not been made with statutory provisions.[8]

A recent case tests the jurisdiction of equity from an unusual point of view. The plaintiff purchased a farm from infant heirs under a contract and deed, both of which recited the contents of the farm as "245 acres, more or less." After the sale had been completed and ratified by the court on the infants' behalf, the plaintiff discovered that the farm contained only 235 acres. He thereupon brought a bill in equity against his vendors, asking for an abatement in the purchase price, and was allowed to recover. *McComb* v. *Gilkeson*, 66 S. E. 77 (Va.). Reformation because of a mutual mistake of fact is one of the most common grounds of equitable jurisdiction; and there can be no doubt that a court may intervene to rescind or reform an executed transaction for the benefit of an infant.[9] In the present case, however, the decree was adverse to the infants. The statutes empowering the sale of infants' lands explicitly limit the jurisdiction to sales which are made in the interest of the infant. It has accordingly been held that since the court has no general jurisdiction to decree the sale of infants' lands, it cannot decree reformation adversely to an infant where his guardian and the purchaser have made a mutual mistake of fact respecting the amount of land covered by the deed.[10] The decision in the present case is manifestly more just and might possibly be reached without logical difficulty on a more liberal interpretation of the statute. Nevertheless, the case suggests the practical advantage of admitting an inherent power in a court of equity, as paramount guardian, to deal as freely with the realty of infants as with their personalty.[11]

PRIVILEGE OF NON-RESIDENT PARTIES AND WITNESSES FROM SERVICE OF PROCESS. — From early times parties and witnesses in any form of judicial proceeding have been privileged from arrest on civil process, *eundo, morando, et redeundo*.[1] The privilege was not primarily personal, but rather the privilege of the court, its object being to prevent any clogging of the

[7] Sale of lands for an advantageous division or better investment: Dampier *v.* McCall, 78 Ga. 607; King *v.* King, 215 Ill. 100; Fitzpatrick *v.* Beal, 62 Miss. 244; Thorington *v.* Thorington, 82 Ala. 489 (sale of infants' estate in remainder). *Contra*, Elliot *v.* Fowler, 112 Ky. 376; Losey *v.* Stanley, 147 N. Y. 560; Rhea *v.* Shields, 103 Va. 305.

[8] Richards *v.* East Tennessee, etc. Ry. Co., *supra;* Elliot *v.* Fowler, *supra.*

[9] Reynolds *v.* McCurry, 100 Ill. 356.

[10] Dickey *v.* Beatty, 14 Oh. St. 389.

[11] A case decided subsequently to the principal case wrought a distinct hardship upon an infant by refusing inherent jurisdiction over his land. The infant took an interest in land under a will which was refused probate because of invalidity. The infant's claim was thereafter advantageously compromised with the sanction of the court. Upon a dispute as to the title of the land, the settlement was held ineffectual. Dixon *v.* Cozine, 64 N. Y. Misc. 602.

[1] VINER, ABRIDGMENT, Tit. "Privilege," B. pl. 3 (Party); C. pl. 16 (Witness).

judicial machinery. So it was a contempt to arrest a privileged person, or, in the court's presence, even to serve summons upon him;[2] at the same time the privileged party could not abate the suit.[3]

England has long recognized that non-residents deserve special favor;[4] but the growth of their privilege has been more carefully worked out in this country, where some of the parties or material witnesses to any suit are so frequently from jurisdictions other than that of the forum. Although a court can command the presence of those within its jurisdiction, it must invite those from without.[5] For while remaining at home a non-resident retains the fundamental and very substantial right to be sued there and only there;[6] a right which he will not lightly endanger by voluntarily submitting to another jurisdiction in order there to testify, sue, or be sued. At a time when an arrest could be had on almost every civil action,[7] exemption simply from arrest afforded him a substantially inclusive privilege. To-day, however, to give the court jurisdiction, the defendant need only be notified, not haled into court; and since, therefore, the *capias* has become the rare exception, and the summons the normal original process, the non-resident demands more than exemption from arrest.[8] Accordingly, he was early[9] granted immunity from service of summons, and the privilege is now well-nigh universal.[10] An anomalous exception, however, that parties plaintiff are not thus privileged[11] is perpetuated in a strong *dictum* of a recent case. *Chittenden* v. *Carter*, 74 Atl. 884 (Conn.). It is everywhere agreed that parties defendant are privileged;[12] but it is argued that as parties plaintiff have set in motion the wheels of justice, they should abide the consequence of being sued in turn. But the great weight of authority[13] holds that as each person is properly to be sued at home, that right is not forfeited by entering the jurisdiction to sue a resident.[14]

To extend this privilege to non-resident defendants in criminal proceedings is to lose sight of the reason for the rule. It is one thing to encourage voluntary submission by a non-resident not otherwise obtainable; it is quite a different thing to accord to the prisoner dragged into the jurisdic-

[2] Cole *v.* Hawkins, Andr. 275.

[3] VINER, ABRIDGMENT, Tit. "Privilege," B. pl. 24; Poole *v.* Gould, 1 H. & N. 99 (disregarding the rule that the privilege extended to summons, as laid down in CHITTY'S ARCHBOLD PRACTICE, 9 ed., 174).

[4] Walpole *v.* Alexander, 3 Doug. 45.

[5] See WORKS, COURTS AND THEIR JURISDICTION, § 37.

[6] Jacobson *v.* Hosmer, 76 Mich. 234; Hale *v.* Wharton, 73 Fed. 739. See also ALDERSON, JUDICIAL WRITS, § 113 *et seq.*, for a full discussion of the matter.

[7] 3 BLACKSTONE, COMMENTARIES, 282.

[8] WORKS, COURTS AND THEIR JURISDICTION, § 35.

[9] Halsey *v.* Stewart, 4 N. J. L. 426; Parker *v.* Hotchkiss, 1 Wall. Jr. (U. S.) 269.

[10] Mitchell *v.* Huron Circuit Judge, 53 Mich. 541 (privilege need not be extended to residents); Andrews *v.* Lembeck, 46 Oh. St. 38 (whether non-residents of county or of state. But see Massey *v.* Colville, 45 N. J. L. 119); Wilson *v.* Donaldson, 117 Ind. 356; Sherman *v.* Gundlach, 37 Minn. 118. But see Cassem *v.* Galvin, 158 Ill. 30.

[11] Bishop *v.* Vose, 27 Conn. 1; Baldwin *v.* Emerson, 16 R. I. 304; Guynn *v.* McDaneld, 4 Ida. 605.

[12] This is true even in Connecticut. Wilson Sewing Machine Co. *v.* Wilson, 51 Conn. 595. *Contra*, Capwell *v.* Sipe, 17 R. I. 475.

[13] *In re* Healey, 53 Vt. 694; Hale *v.* Wharton, 73 Fed. 739. The special nature of the remedy sought will explain Mullen *v.* Sanborn, 79 Md. 364.

[14] The privilege, being founded on common-law principles, is not derogated by statutes allowing service on a defendant "wherever found." Wilson *v.* Donaldson, 117 Ind. 356. *Contra*, Christian *v.* Williams, 111 Mo. 429.

tion perforce, a privilege denied to residents.[15] It is true that one extradited from a foreign country is privileged at least from arrest on civil process.[16] But this is because of the express provisions of treaties; whereas interstate rendition is a matter not of comity but of constitutional right. So, too, the privilege extends to one brought into the jurisdiction on charges trumped up for the purpose.[17] But that is only one instance under the broader independent rule that all persons, whether concerned in judicial proceedings or not, who are brought into the jurisdiction improperly, as by fraud or force, are privileged.[18] Some courts, however, privilege all non-resident defendants in criminal actions.[19] Thus privilege from arrest was given in *Weale* v. *Clinton Circuit Judge*, 123 N. W. 31 (Mich.). But on the other hand, privilege even from summons was denied in *Netrograph Mfg. Co.* v. *Scrugham*, 197 N. Y. 377. In the latter case the fact that the prisoner's return on bail was in a sense voluntary affords ground for an arguable distinction;[20] yet as he was always potentially in the power of the court, privilege was properly denied him.[21]

In short, any one not subject to interstate rendition, coming voluntarily from without the jurisdiction to participate therein in any form of judicial proceeding, either civil or criminal, should be privileged from service of all civil process while remaining in the jurisdiction[22] for the original purpose.[23]

RISK OF LOSS AFTER AN EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE. — If, after an executory contract for the sale of real estate, the property is destroyed by fire,[1] upon whom should the loss fall? Where the calamity is occasioned by the fault of either of the contracting parties, or where the contract expressly provides for risk of loss,[2] the answer is simple; but further than this neither the courts nor students of the law[3] are agreed. As failure of consideration is ground for rescinding a contract, the destruction of any considerable part of the *res* before performance ends all

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[15] Goodwin *v.* Lordon, 1 A. & E. 378; Hare *v.* Hyde, 16 Q. B. N. S. 394; Scott *v.* Curtis, 27 Vt. 762.

[16] *In re* Reinitz, 39 Fed. 204.

[17] Byler *v.* Jones, 79 Mo. 261.

[18] Williams *v.* Reed, 29 N. J. L. 385.

[19] Moletor *v.* Sinnen, 76 Wis. 308; Jacobson *v.* Hosmer, 76 Mich. 234; State *ex rel.* Hattabaugh *v.* Boynton, 121 N. W. 887 (Wis.).

[20] Gilpin *v.* Cohen, L. R. 4 Ex. 131.

[21] Reid *v.* Ham, 54 Minn. 305. *Contra*, Kaufman *v.* Garney, 173 Fed. 550; Martin *v.* Bacon, 76 Ark. 158.

[22] The privilege should not extend to causes of action arising therein. See Nichols *v.* Horton, 14 Fed. 327, 330.

[23] The privilege may be set up by a plea in abatement, or preferably by a motion on special appearance. See Thornton *v.* American Writing Machine Co., 83 Ga. 288.

[1] For losses from other causes, involving the same question, see 15 HARV. L. REV. 733 (eminent domain); Poole *v.* Shergold, 2 Bro. C. C. 118 (blowing down of timber); Kenney *v.* Wexham, 6 Madd. 355 (death of *cestui que vie* in sale of annuity).

[2] See Marks *v.* Tichenor, 85 Ky. 536. The courts examine the contract closely for any indication of the parties' intention as to risk of loss. See Allyn *v.* Allyn, 154 Mass. 570.

[3] See 1 HARV. L. REV. 373 *et seq.*; 9 HARV. L. REV. 106; 1 COLUMBIA L. REV. 1.